Office-Supreme Court, U.S.
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CLERK

85-120

No. .....

In the Supreme Court of the United States

October Term, 1985

CANYONEERS, INC.
An Arizona Corporation, dba,
GRAND CANYON TRAIL GUIDES
Petitioner,

v.

DONALD HODEL, Secretary
Department of the Interior, et al.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was the lower court's interpretation of Petitioner's statutory "Right of Preference" in the renewal of its concession permit erroneous, and to that extent (a) should the right of preference in a contract or permit renewal that is granted to satisfactory concessioners under the Concessions Policy Act of 1965, 16 U.S.C. §§ 20-20g (1982) and its implementing regulations be misinterpreted so as to frustrate Congress' clearly articulated objectives of facilitating the continuity, security, and profitability of park concession operations, or (b) should this statutory right of prefreence be interpreted so as to promote Congress' express purpose of providing quality and continuity in the provision of services to park visitors?

2. Was the National Park Service's refusal to grant Petitioner a renewal concession permit, covering substantially the same facilities and services as provided under its prior permit, arbitrary, capricious, unreasonable, an abuse of discretion and contrary to law as set forth in 16 U.S.C. § 20 et. seq., and 36 CFR § 51.3(b) and 51.5?

3. Should the National Park Service be estopped from arbitrarily refusing now to authorize the sale of hiking and backpacking equipment in Petitioner's renewal permit?

4. Did the lower court err in failing to issue a Writ of Mandamus compelling the National Park Service to adhere to its duty under the Concessions Policy Act, and its implementing regulations and renew Petitioner's hiking and backpacking equipment sales authority?

PARTIES TO THE PROCEEDING BELOW

Plaintiff:

CANYONEERS, INC.,
An Arizona Corporation, dba,
GRAND CANYON TRAIL GUIDES

Defendants:

DONALD HODEL, Secretary,
Department of the Interior

WILLIAM MOTT, Director,
National Park Service

HOWARD H. CHAPMAN,
Director, Western Region,
National Park Service

RICHARD MARKS, Superintendent,
Grand Canyon National Park

Other Interested Parties:

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 756 F.2d 754 (9th Cir. 1985), and is printed in Appendix A hereto, infra.

The Judgment of the United States District Court for the District of Arizona is reported at 596 F. Supp. 106, and is printed in Appendix A hereto, infra.

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 29, 1985. A timely Petition for Rehearing was denied on May 29, 1985. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves the Concessions Policy Act of 1965, P.L. 89-249, published at 16 U.S.C. § 20 et. seq. federal regulations promulgated thereunder at 36 C.F.R., Part 51; and § 706 of the Administrative Procedure Act, 5 U.S.C. Because of their length, the pertinent text of said statutes and regulations are set forth in Appendix B.

STATEMENT OF THE CASE

Canyoneers, Inc., Petitioner herein, brought an action in the United States District Court for the District of Arizona seeking judicial review of the National Park Service's (hereafter NPS) decision not to include the right to sell hiking and backpacking equipment in Canyoneers, Inc.'s (hereafter Canyoneers) renewal concession permit, and seeking a Writ of Mandamus and injunctive relief. Federal jurisdiction was based on 28 U.S.C. § 1331(a). The authority to sell hiking and backpacking equipment was critical to Canyoneers' renewal permit because those sales accounted for over fifty per cent (50%) of the business' income.

The parties filed Cross-Motions for Summary Judgment in the United States District Court for the District of Arizona, and NPS' Motion was granted. Canyoneers' Motion was denied and its Complaint was dismissed.

The case was appealed to the Ninth Circuit Court of Appeals which affirmed the decision of the District Court. A Petition for Rehearing En Banc was denied. Canyoneers secured a Stay of Mandate of the Order of the Ninth Circuit pending disposition by this court of its Petition.

THE RULINGS BELOW

The District Court ruled, in *Canyoneer's, Inc. v. Clark*, 596 F. Supp. 106 (D.C. Ariz. 1984), included herein, at Appendix A, that the "right of preference" defined in 36 C.F.R. § 51.3(b) (promulgated pursuant to 16 U.S.C. § 20d), is not an enforceable right or entitlement to be offered in a renewal concession permit or contract. The Court ruled further that the Secretary of the Interior and/or his delegate is not obliged to renew contracts or permits at all under 16 U.S.C. § 20d.

The Court further ruled that:

> "If, however, the Secretary chooses to issue a new contract, permit, or renewal thereof, which contract, permit, or renewal thereof covers "substantially the same accommodations, facilities and services," 36 C.F.R. § 51.3(b), as that provided under the contract or permit of an existing satisfactory concessioner, then the Secretary must recognize and honor the right of preference in the existing satisfactory concessioner and give that concessioner "an opportunity to meet the terms and conditions of the pest proposal," 36 C.F.R. § 51.5(b), made by a party with no right of preference."

Under the Arizona District Court's interpretation of 36 C.F.R. § 51.3(b), the "right of preference" urged by Canyoneers does not exist.

The United States Court of Appeals affirmed the Arizona District Court, and ruled, in *Canyoneer's Inc. v. Hodel,* 756 F.2d 754 (9th Cir. 1985), included herein at Appendix A, "that the statutory 'preference in the renewal of contracts or permits' does not entitle satisfactory concessioners to an automatic right of renewal, but rather a right to meet the terms of any competing proposal submitted to the Secretary for the provision of substantially similar services".

The rulings of the courts below have set the stage for the disintegration of the National Park System to the detriment of the public and present concessioners. Both courts below have disregarded the purpose and intent of the renewal provisions of 16 U.S.C. § 20d and the regulations promulgated thereunder, 36 C.F.R. § 51.3(b). The decisions of the lower courts ignore the legislative history of the Act, NPS' own interpretation of the statute since 1965, and the clear language of the Act.

NPS has renewed virtually every contract and permit on substantially the same terms and conditions since 1965, unless the services were discontinued by NPS in a national park or the concessioner was declared to be an unsatisfactory concessioner.

The legislative history, cited infra, reveals that the purpose of the Act is to insure concessioners a reasonable opportunity to realize a profit on their operations as a whole commensurate with the capital invested and the obligations assumed, and to insure that visitors to the parks can expect to rely on the ongoing services provided by experienced and satisfactory concessioners who

are familiar with the problems and policies of the national parks and the needs and expectations of the visiting public.

The right of preference in renewal of contracts and permits is perhaps the most important long-term investment incentive granted to concessioners under the Act. The interpretation by the lower courts of that right is erroneous and because it provides the basis for denial of Canyoneers' permit renewal covering substantially the same services, the decisions should be reversed.

THE FACTS

In December, 1975, the NPS granted a concession permit to Canyoneers authorizing it to provide a guide service for hikers and campers; hiking and backpacking equipment rentals and information services; and, upon authorization, sales of hiking, backpacking and camping equipment. In the Spring of 1978, the NPS authorized Canyoneers to sell lines and items of hiking and backpacking equipment.

The NPS' 1978 authorization to Canyoneers to sell hiking and backpacking equipment was based on several factors. In 1975, after Park Superintendent Stitt observed that as a result of the dramatic increases in backpacking and hiking in the Grand Canyon National Park and the NPS' goal to encourage all participants to have safe and proper equipment, it was determined that an existing concessioner, Babbitt Brothers Trading Company (hereafter Babbitt), was not providing a sufficient variety and quality of hiking and backpacking equipment available for sale to meet the needs of visitors to the Park.

In accordance with the statutory and contractual right of the existing concessioner, Babbitt, the Superintendent requested said concessioner to provide additional hiking and backpacking equipment for sale to the public and in connection therewith, to provide specially trained or experienced sales persons to assist the buying public and to locate all of said equipment in a separate store location.

Over a two-year period, the existing concessioner was given numerous opportunities and deadlines to comply with the Superintendent's request. During that time period, Babbitt declined the Superintendent's requests to provide an expanded hiking and backpacking operation, and thereupon, having determined that it had not received a satisfactory response to its request, the NPS announced on June 13, 1977, that it was negotiating a three-year concession permit with Canyoneers, which authorized the sales of hiking and backpacking equipment.

In the June 13, 1977 News Release, the NPS reported that Canyoneers had satisfactorily performed its obligations under an expiring permit and was entitled to be given preference in the negotiation of a new permit. There is no dispute in this case that Canyoneers has performed its obligations under its permits satisfactorily.

Canyoneers advised the NPS of its interest in continuing to provide substantially the same services it had provided under its prior permit, including sales of hiking and backpacking equipment. No other proposals were forthcoming and the permit was issued to Canyoneers.

Shortly thereafter, Park Superintendent Stitt authorized in writing the sale of specific hiking and backpacking equipment and accessories.

Canyoneers' permit, including the right to sell hiking and backpacking equipment, was renewed in intervals through September 30, 1983. In connection with each renewal or extension, the NPS reiterated in writing that Canyoneers had satisfactorily performed its obligations under prior permits, and was therefore, entitled to continued authorization to sell hiking and backpacking equipment in connection with its guided hiking service.

In February, 1982, the NPS again published a Notice of Intention to Issue a Permit to Canyoneers stating Canyoneers had satisfactorily performed its obligations and was entitled to preference in renewal of its permit to provide substantially the same services theretofore provided by it in the Park. Canyoneers submitted its proposal to provide the requested services. No other proposals were forthcoming.

However, after six years of silence, Babbitt requested that Canyoneers not be permitted to sell hiking and backpacking equipment, arguing that said sales infringed on Babbitt's concession right to sell said equipment. Immediately thereafter, Park Superintendent Marks arbitrarily withdrew the Statement of Requirements stating, but not specifying, "several material and significant differences between Canyoneers' proposal and the SOR.

NPS has acknowledged that Canyoneers is a satisfactory concessioner and has conceded that the need still

exists in Grand Canyon National Park for specialized sales of hiking and backpacking equipment, but nevertheless, on July 12, 1983, it revoked Canyoneers' right to sell said equipment and refused to include in a new SOR, Canyoneers' right to continue selling hiking and backpacking equipment.

Canyoneers thereupon filed suit in the United States District Court for the District of Arizona to protect its statutory "right of preference" in the renewal of its concession permit. Canyoneers secured a Temporary Restraining Order and subsequent stays permitting it to continue to operate under the terms of its prior permit, pending final resolution of its action.

REASONS FOR GRANTING THE WRIT

The Court should grant Canyoneers a Writ of Certiorari because the United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The following reasons establish why this question of federal law is important, and why this Court should settle it.

I. THE LOWER COURT'S DECISION IS BASED ON AN ERRONEOUS INTERPRETATION OF 16 U.S.C. § 20 ET. SEQ., AND 36 C.F.R. § 51, AND IF UPHELD, WILL DESTROY CANYONEERS' BUSINESS AND BODE THE EVENTUAL COLLAPSE OF THE ENTIRE NATIONAL PARK SYSTEM.

Canyoneers' appeal is particularly suited for Supreme Court review, and therefore, its Petition for Writ

of Certiorari should be granted, because the decisions of the lower courts are based on the meaning and effect of provisions in the Concession Policy Act of 1965, and federal regulations promulgated thereunder, which govern the "right of preference" a satisfactory concessioner is entitled to in the renewal or negotiation of concession contracts and permits. The District Court below correctly stated that the issue of the meaning and effect of said "right of preference" is one of first impression in the federal courts. *Canyoneers v. Clark,* 596 F. Supp. 106 (attached hereto as Appendix A).

The interpretation rendered by the lower courts as to the meaning and effect of a national park concessioner's "right of preference" is erroneous, in that it directly conflicts with the purpose and intent of the entire Concessions Policy Act, as evidenced by the express language of the Act and the regulations and the Act's legislative history.

A. Purpose of the Concessions Policy Act of 1965.

The "right of preference" in the renewal and negotiation of contracts or permits, granted by the Concessions Policy Act to existing satisfactory concessioners, is an essential requirement in a carefully constructed system whereby concessioners are chosen, and concession contracts and permits are issued by the NPS to foster the specific goal or purpose of the Act.

Section 20 of the Act includes a statement of the purpose of concessions policy. In brief, the stated objectives are two fold:

(1) preservation of the scenery, wildlife and natural and historic objects in the national parks; and

(2) provision of such accommodations, facilities and services as are necessary and appropriate for public use and enjoyment of the national parks.

B. Provisions Essential to the Achievement of the Goals of the Act.

The Act includes two provisions essential to the achievement of the above stated goals of the Act. Section 20a states that pursuant to the policy stated in the Act, the Secretary "shall take such action as may be appropriate to encourage and enable private persons and corporations to provide and operate facilities and services which he deems desirable for the accommodation of visitors in areas administered by the NPS."

In brief, the two factors essential for protection of the Park and accommodation of visitors thereto are to:

(1) encourage and enable private concessioners to provide the services; and

(2) allow the NPS its discretion in determining what facilities and services are initially necessary and desirable.

C. Specific Legislation Drafted to Accomplish the Goals of Act.

In drafting the Concessions Policy Act, the legislators included several important provisions which were deemed absolutely essential requiremnts to perpetuate the purposes of the Act.

(1) Legislation Specifically Designed to Encourage and Enable Private Persons and Corporations to Provide and Operate Facilities and Services.

Because of the great limitations and restraints under which national park concessioners operate, as more fully explained below, the drafters of the Act realized that in order to encourage and enable private concessioners to operate in the Park, certain protective provisions were absolutely necessary. The Act mandates the NPS to:

(a) Insure the continuity of operations and facilities of park concessioners (§ 20d); and

(b) Provide concessioners with a reasonable opportunity to realize a profit on their operations as a whole. (§ 20b(b)).

The legislative history is replete with discussions as to why such provisions are necessary to encourage and enable private concessioners. At the time the Act was drafted, it had become clear that in order to meet the needs of the increased numbers of visitors to the national parks, the investment of substantial amounts of private capital would be required. It was argued that there must be an atmosphere of assurance that the investor would be able to earn a fair return on his money over a reasonably long period of time.

It was further asserted by proponents of the Bill that opposition to the Bill comes from people who fail to appreciate the special problems and difficulties of park concessioners. Proponents argued that some other restraints not imposed on the rest of the tourist services industry are:

> 1. The concessioners do not own the lands on which they erect expensive buildings and improvements; they are thus prevented from borrowing money on ordinary mortgage arrangements.
>
> 2. Most of the concessioners operate highly seasonal businesses with their assets idle the rest of the year. They are often located far from established communities and suppliers.
>
> 3. They operate under rigorous, detailed Government contracts which frequently require nonprofitable services and under which their rates and prices are subject to control by the Secretary of the Interior.
>
> 4. The concessioners must pay, in addition to all regular taxes and business expenses, a Park Service franchise fee.
>
> 111 CONG. REC. H23634 (Daily ed. Sept. 14, 1965) (Remarks of Rep. Aspinall).

Mr. Aspinall, Chairman of the Committee on Interior and Insular Affairs, recited an important justification for a concessioner's preferential right of renewal.

> A third important feature of H.R. 2091 directs the Secretary of the Interior "to encourage continuity of operation and facilities and services in the renewal of contracts and permits and in the negoti-

> ation of new contracts or permits who have performed their obligations to the satisfaction of the Secretary." This provision is important to the [NPS], to the concessioners, and to the public which both of them serve. Certainly the value of an experienced concessioner, familiar with the problems of the national park in which he operates, the policies of the [NPS], and the needs and expectations of the public which visits his area cannot be overestimated. Continuity of service, as Members of the House well know from their own experience here, is a valuable asset in any walk of life. It is not something to be thrown away, as opponents of the bill would throw it away, if I understand them correctly, if someone else outbids an established concessioner and thus brings in a few dollars extra income to the Government. 111 CONG. REC. H23637 (Daily ed. Sept. 14, 1965) (Statement of Rep. Aspinall).

Further debate in the House of Representatives clarified the importance of a concessioner's preferential right of renewal:

> Long ago we established the policy that private enterprise—under contract with the [NPS]—should provide these services—and not the Federal Government. But if private enterprise is to provide the facilities and the services required to accommodate the ever-increasing number of park visitors, it must have some assurance that it will not have the rug pulled out from under it. It must be able to negotiate loans. To provide facilities takes money. Business must be in a position to secure capital. To do this, it must meet the demands of capital. . .
>
> Eighth. We recognize that good service is usually related to continuity of operations. The

> operation of facilities within a park is seasonal in nature. A company must be able to keep its key personnel. This cannot be done unless there is a central charge in management. These are specialized businesses calling for special knowledge and understanding of Government operations. 111 CONG. REC. H23644 (Daily ed. Sept. 14, 1965) (Remarks of Representative Skubitz).

The legislative history further elucidates the rationale of subsection 20b(b). As remarked by Representative Aspinall, "there must also be an assurance that the investor — whether he be an investor of equity capital or an institutional lender — will probably earn a fair return on his money over a reasonably long period of time." 111 Cong. Rec. 23636 (daily ed. Sept. 14, 1965) (statement of Rep. Aspinall).

Congress recognized the need to provide concessioners with a substantial and enforceable right. According to Representative Udall, the right of preference "deals with a situation where the Secretary has decided there is a public need and that public convenience will be served by concessioner operation within . . . a national park. Having made that decision, this language says that he may include in the contract some protection against this man being wiped out or his investment being wiped out by an arbitrary decision by the Secretary." 111 Cong. Rec. 23653 (daily ed. Sept. 14, 1965) (statement of Rep. Udall).

(2) Legislation Designed to Permit Discretion

Congress has given the NPS the discretion to determine what accommodations, facilities and services shall

ities to be necessary or desirable to accommodate the public, then it must honor the concessioner's right of preference and renew the contract or permit.

E. Canyoneers' Interpretation of the "Right of Preference" is Consistent with the Goals of the Concessions Policy Act.

When a contract or permit comes up for renewal and NPS has determined that the facilities and services provided in the old contract or permit continue to be necessary and appropriate for public use and enjoyment of a national park area and provided the concessioner has performed its obligations under the prior contract or permit to the satisfaction of the NPS, NPS must renew the contract or permit under substantially the same terms and conditions as provided by the concessioner under its prior contract or permit.

This interpretation of 16 U.S.C. § 20d and 36 C.F.R. § 51.3(b) gives effect to the legislative intent to encourage continuity of operation and facilities. It carries out the statutory mandate that concessioners are entitled to realize a profit on their operations as a whole commensurate with the capital invested and the obligations assumed.

Under this system, NPS has complete management flexibility and discretion to regulate the national park system in accordance with the fundamental objectives outlined in 16 U.S.C. § 20. NPS would not be forced to award contracts or permits to satisfactory concession-

ers for unnecessary or undesirable services, as stated by the lower court.

NPS has the discretion, at any time, to decide what facilities and services are necessary and appropriate for public use in a national park. If NPS makes a determination at the time of a contract or permit renewal that certain services and facilities are no longer necessary and appropriate and decides to remove these services from the park altogether, it could delete those services and facilities from the new contract or permit. In this case, NPS decided that it is necessary and appropriate to continue to sell hiking and backpacking equipment in the park and is permitting other concessioners to do so.

The lower courts held that the 16 U.S.C. § 20d and 36 C.F.R. § 51.3(b) "right of preference" is not an enforceable right or entitlement and further that NPS is not obliged to renew contracts or permits at all.

The lower courts' rulings are clearly erroneous in that regard because the NPS is responsible for providing facilities and services for public enjoyment of the national parks through concessioners and if the NPS has determined that certain facilities and services are necessary and appropriate for public use and enjoyment of a national park area, it must take steps to provide those facilities and services. *Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n*, 393 U.S. 186, 21 L. Ed. 2d 334, 89 S. Ct. 354 (1968).

If NPS has determined that facilities and services are necessary and appropriate as of the time a contract

or permit is up for renewal, the contract or permit must be renewed in accordance with 36 C.F.R. § 51.3(b).

The lower courts' interpretation of 36 C.F.R. § 51.3(b) is clearly erroneous, in that it would permit NPS to arbitrarily delete a facility or service from a contract or permit upon renewal, even though NPS had determined that the facility and service continues to be necessary and appropriate for public use and enjoyment of the national park area. Such an interpretation would also permit NPS to delete a facility or service from a contract or permit upon renewal, which would be necessary to make the business operation viable.

In this case, NPS refused to authorize Canyoneers to continue to sell hiking and backpacking equipment in the new permit from which Canyoneers derives in excess of fifty per cent (50%) of its gross revenues.

Without the revenues from the sale of hiking and backpacking equipment, Canyoneers could no longer continue in business. The congressional intent to provide Canyoneers with a reasonable opportunity to realize a profit on its operations as a whole commensurate with the capital invested and the obligations assumed has been frustrated.

It is undisputed in this case that NPS determined that continued sales of hiking and backpacking equipment in the Grand Canyon National Park are necessary and appropriate for public use and enjoyment of the park and are presently being provided in the park. The lower court's ruling would permit NPS to arbitrarily take away

facilities and services from one concessioner and award them to another, destroying businesses in the process.

F. The Lower Courts' Interpretation of the "Right of Preference" undermines the Goals of the Act.

If the Ninth Circuit Court's interpretation of the statutory "right of preference" is affirmed, the right would become virtually meaningless. In effect, the Ninth Circuit Court held that permit renewals are discretionary with the NPS in every case, and that the right of preference merely refers to procedural niceties that are required if and only if the NPS first decides that there will be a permit or contract renewal. The Ninth Circuit Court's decision thereby deprives concessioners of their statutory guarantees of continuity and profitability.

These guarantees were not designed to insure the financial security of concessioners solely as an end in itself; rather, Congress recognized that continuity and profitability of concession operations would ultimately benefit park users, "[whose] needs and expectations . . . cannot be overestimated." 111 Cong. Rec. 23637 (daily ed. Sept. 14, 1965) (statement of Rep. Aspinall).

The legislative history spawning the Concessions Policy Act of 1965 further supports this user-benefit argument.

> The second prerequisite for a good concession bill is a recognition on our part that it is primarily the public that the concessioners are serving, not the Government . . . But concessions must be adapted both to the environment in which they operate and to the public they are called upon to serve.

> They must always be so operated that they do not interfere with the purposes for which the parks are established. They must, above all, be so operated that those who visit the parks are taken care of at reasonable prices.

111 Cong. Rec. 23647 (daily ed. Sept. 14, 1965) (statement of Rep. Rivers).

> We must think of the concessioner as an integral part of our national park system. He is there to serve the public and he must be selected with this in mind.

111 Cong. Rec. 23637 (daily ed. Sept. 14, 1965) (statement of Rep. Aspinall). These expressions of congressional intent culminated in the statutory "right of preference," and in the Act's express admonition that the NPS is to administer the national parks for the ultimate benefit of the general public. *See* 16 U.S.C. §§ 20d (1982).

By emasculating the "right of preference" bestowed upon satisfactory concessioners under the Concessions Policy Act, the lower courts open the door to the very evil that the right was designed to prevent. Without a preference right of permit renewal, concessioners will be dissuaded from, and inhibited in, securing the type of long-term financing necessary to hire experienced personnel and purchase quality equipment. Park visitors will no longer be assured safe,, rewarding, and relatively inexpensive guided hikes, animal rides, rafting tours and other similar experiences in Grand Canyon National Park or in any other national park. Park users will be the ultimate casualty of the District Court decision.

In upholding the District Court's construction of the "right of preference", the Ninth Circuit stated that such would afford the satisfactory concessioner the opportunity to match competing proposals. Canyoneers has never argued that its interpretation of the "right of preference" would allow it to renew without meeting the requirements of 36 C.F.R. § 51.5(b), that it must still meet the best proposal of other concessioners responding to the NPS' fact sheet.

The correct interpretation of the "right of preference" and the renewal process, as stated above, simply requires the NPS to include in its fact sheet substantially the same accommodations, facilities and services as those provided by the satisfactory concessioner, and if said concessioner fails or refuses to meet the best proposal, then it loses its right to renewal or negotiation.

In the lower courts' interpretation of "right of preference", it failed to take into consideration the purpose of the renewal provisions in light of the overall goals of the Concessions Policy Act, and therefore, the interpretation is erroneous, and should be overturned. Canyoneers is entitled to a Writ of Certiorari to so establish.

II. ANOTHER FEDERAL COURT'S RECENT INTERPRETATION OF THE "RIGHT OF PREFERENCE" CONFLICTS WITH THE INTERPRETATION RENDERED BELOW.

The ruling in the present case directly conflicts with a recent decision of the United States District Court for the Eastern District of Missouri. In *Current-Jacks Fork*

Canoe Rental Association v. Clark, (F.D. Mo. 1985), a copy of which is included herein under Appendix C, the Court held that, "In reading the applicable statute, 16 U.S.C. § 20d, this Court is convinced that granting a right of preference to existing concessioners is mandatory, not discretionary."

The Missouri Federal Court, however, incorrectly distinguished the case at bar. The facts below show that the NPS had decided to eliminate the merchandising service from Canyoneers' permit, not from the Grand Canyon National Park altogether.

The Supreme Court should settle this issue of federal law so as to insure continuity of interpretation and application of federal law throughout the federal system.

III. IF THE LOWER COURT'S INTERPRETATION OF THE "RIGHT OF PREFERENCE" IS LEFT INTACT, THE ENTIRE NATIONAL PARK CONCESSIONS SYSTEM WILL BE DISRUPTED AND PUBLIC VISITATION TO THE PARKS WILL BE DIRECTLY AND ADVERSELY IMPACTED.

The decision by the Ninth Circuit Court of Appeals in this action, if upheld, would permit the NPS to do universally what it has done in the Grand Canyon under the facts of this case. NPS could hereafter refuse to comply with the requirement that permit renewal be for substantially the same accommodations, facilities and services; delete critical services necessary for the con-

tinued economic viability of the concessioner; and renew permits which grant concession rights wholly different from those satisfactorily provided under the existing permit.

The impact of the decision of the Ninth Circuit Court of Appeals in this action is not limited to Canyoneers' concession business. It opens the door for the NPS to similarly violate the rights of renewal preference of countless other national park concessioners. The result would be devastating to all operations in the national parks, and the use of the parks by the public. If concessioners cannot rely on statutory protections of their long-term continuity in providing services, their ability to obtain financing will be greatly impaired, and thereby their ability to continue satisfactorily and economically providing services to the public in the national parks.

Because of the universal impact of the decision of the lower court, Canyoneers' claim is particularly suited for Supreme Court consideration and its Petition should be granted.

IV. THE LOWER COURT ERRED BY FAILING TO HOLD THAT NPS ACTED ARBITRARILY AND CAPRICIOUSLY BY REFUSING TO INCLUDE AUTHORITY TO SELL HIKING AND BACKPACKING EQUIPMENT IN CANYONEERS' NEW PERMIT.

The standard for judicial review of NPS' actions is set forth in § 706 of the Administrative Procedure Act

(5 USC § 706), which provides that, "A reviewing court shall hold unlawful and set aside an agency's action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . ." With respect to the "arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law" test, the Court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.

NPS chose to ignore its own administrative history in interpreting 36 C.F.R. § 51.3(b), did not give effect to the legislative intent of 16 U.S.C. § 20d and the regulations promulgated thereunder, and failed to follow the clear language of the statute outlining its duties to Canyoneers.

The lower courts held that, "The decision not to renew Plaintiff's permit appears to have rested on the 'material and significant differences' between NPS' Statement of Requirements and Plaintiff's proposal, as outlined in Superintendent Marks' letter of April 30, 1982."

The Ninth Circuit below agreed with the District Court and held that, "Plaintiff's response was deemed inconsistent with the terms of the SOR and therefore unacceptable to the Secretary."

The administrative record revealed, however, that Canyoneers advised Superintendent Marks that they "hereby agree to the requirements specified in the Statement of Requiremnts".

While Director Dickenson based his decision not to authorize the sale of hiking and backpacking equipment in Canyoneers' new permit on the grounds that he has "complete discretion to decide the scope and nature of the services that may be provided to the public by Canyoneers in any future permit", it is obvious from the administrative record that the real reason NPS decided as it did was that it had determined it could be infringing on the contractual rights of other concessioners in the park, and that it feared a possible breach of contract action by the other concessioners. Such motivation is arbitrary, capricious and an abuse of discretion.

NPS has determined to continue to offer sales of hiking and backpacking equipment to the public in Grand Canyon National Park, but has arbitrarily determined that said services theretofore satisfactorily provided by Canyoneers should now be provided by other concessioners who have never submitted a proposal as required by 36 C.F.R. § 51.3(b).

NPS has renewed virtually every contract and permit since 1965 on substantially the same terms and conditions as the prior contract or permit. Its refusal to renew Canyoneers' permit on substantially the same terms and conditions is arbitrary and capricious.

When Canyoneers' permit came up for renewal, the NPS published notice of its intent to negotiate a new permit. Canyoneers responded affirmatively to the statement of requirements. No other response or offer was forthcoming.

In particular, Babbitt did not submit an offer of its own, but merely notified the NPS of its displeasure, and requested the SOR be changed to exclude Canyoneers' right to sell hiking and backpacking equipment. The NPS thereupon withdrew its proposal to negotiate with Canyoneers on substantially the same terms, stating that Canyoneers' response failed to meet the proposal. The NPS has never elucidated the particular points which did not meet the NPS' requirements.

Canyoneers has met all legal requirements on which a renewal permit is conditioned. (36 C.F.R. § 51.5). The NPS' refusal to renew Canyoneers' permit covering substantially the same services is, therefore, arbitrary, capricious and an abuse of discretion.

V. THE LOWER COURT ERRED IN FAILING TO ISSUE A WRIT OF MANDAMUS.

The lower court erred in failing to issue a Writ of Mandamus to compel NPS to perform the duties owed by it to Canyoneers.

28 U.S.C. § 1361 provides:

> § 1361. Action to compel an officer of the United States to perform his duty
>
> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the Plaintiff.

Mandamus is appropriate even where a statute re-

quires judicial or administrative construction to clarify the duty owed to Plaintiff, so long as the construing body is not telling Defendant not to exercise his discretion. *Martinez v. Dunlop,* 411 F.Supp. 5 (D.C. Cal. 1976).

Mandamus is appropriate in this case because there are express mandates in 16 U.S.C. § 20 et seq. and 36 C.F.R. § 51.3(b) which NPS officials are not obeying and where these officials are acting outside the zone of their permissable discretion and contrary to law. *Corrugated Container Corporation v. Community Services Administration,* 429 F. Supp. 142 (D.C. Va. 1977).

VI. THE LOWER COURTS ERRED IN FAILING TO ORDER THAT NPS BE ESTOPPED FROM INTERFERING WITH CANYONERS' RIGHT TO CONTINUE SELLING EQUIPMENT.

The NPS has ordered that, "All items of 'sporting goods' and 'merchandise' held for sale to the public by Canyoneers shall cease, be removed from public view, and removed from the park as soon as possible." If the NPS' decision is permitted to stand, Canyoneers' concession business would be destroyed, since over 50% of its gross income is derived from the sale of the items now prohibited by NPS.

It is conceded by NPS that on April 8, 1975 Merle E. Stitt, then Superintendent of the Grand Canyon National Park, requested Babbitt to provide additional backpacking and hiking equipment, pursuant to Section 16

of the Contract between NPS and Babbitt. It is undisputed that Mr. Stitt determined in 1977 that Babbitt had failed to comply with the request. Based on Mr. Stitt's decision, NPS executed a permit authorizing Canyoneers to sell hiking and backpacking equipment as approved in writing by the Superintendent.

Mr. Stitt's determination made in 1977 after a careful analysis of all the evidence available to him should be honored by his successors. Any efforts by the successors seven years after the fact to overrule Mr. Stitt should not be honored by this Court. NPS officials of the Western Region had knowledge of Mr. Stitt's actions in 1975 and 1977 and failed to take any action for seven years.

NPS has made the argument that Mr. Stitt erroneously determined that Babbitt gave up its preferential right to sell additional hiking and backpacking equipment and that NPS cannot be estopped from requiring Canyoneers to suffer the consequences of the mistake. Canyoneers asserts that Mr. Stitt acted properly, but even if he did make a mistake, this mistake may not be rectified at Canyoneers' expense. The weight of this mistake must fall upon those who made, or acquiesced in, the error. Termination of Canyoneers' rights simply because NPS officials have previously acted improvidently would work a fundamental injustice upon innocent parties who have dealt in good faith with their government. NPS should be estopped from denying, seven years later, rights which have vested at a considerable expense and in justifiable reliance upon NPS' representations.

The rule in the majority of Federal Circuit Courts is that "estoppel is available against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel." *United States v. Lazy FC Ranch*, 481 F.2d 985, 988-89 (9th Cir. 1973).

Secretary Stitt determined that the existing concessioner, Babbitt, failed to respond to its request for new or additional services, and therefore, contracted with Canyoneers to so provide. He did so intending that Canyoneers rely on said authorization, and Canyoneers, in good faith, did in fact rely on said authorization to its detriment. The government should be estopped from refusing to include sales authority in a contract with Canyoneers based on its argument that Superintendent Stitt erred in granting said authority.

In addition, the actions by the NPS show "affirmative misconduct" necessary to establish estoppel against the government. It has refused to recognize the statutory limits on its discretion and authority throughout the renewal process involving Canyoneers' permit. It has failed to recognize the legislative intent behind the statutes and regulations governing the renewal process. It has failed to treat Canyoneers as it has treated every other satisfactory concessioner in the national parks of the United States, which has been involved in contract and permit renewals. The NPS has admitted in its Answers to Interrogatories that every satisfactory concessioner involved in the renewal process received a new contract or per-

mit with substantially the same terms and conditions as their old permits and contracts.

CONCLUSION

WHEREFORE, Canyoneers respectfully prays that a Writ of Certiorari be granted.

DATED this 15th day of July, 1985.

FRANCIS J. NIELSON
Arnovitz, Smith & Nielson
Attorney for Petitioner
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Suite 1305
Salt Lake City, Utah 84101
(801) 322-0524

CERTIFICATE OF SERVICE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I hereby certify that on this 18th day of July, 1985, I placed a true and correct copy of Canyoneers' Petition for Writ of Certiorari in the United States mail, postage prepaid, to each of the parties listed below. All parties required to be served have been served.

CHARLES FREID (3 copies)
U.S. Solicitor General
U.S. Department of Justice
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Francis Nielson
FRANCIS J. NIELSON
Attorney for Petitioner

Linda Osmond
Notary Public Residing in
Salt Lake County, State of Utah

Subscribed and Sworn to before me this 18th day of July, 1985.
My Commission Expires:
May 16, 1988

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CANYONEERS, INC., an Arizona corporation,
d-b-a Grand Canyon Trail Guides,

Plaintiff,

vs.

WILLIAM P. CLARK, Secretary,
Department of the Interior, et al.,

Defendants.

CIV 83-1881 PHX CAM

ORDER

Having received and considered Plaintiff's Motion for Summary Judgment and Statement of Facts pursuant to Local Rule 11(i), filed January 31, 1984; Defendants' Response to Plaintiff's Motion for Summary Judgment and Statement of Facts pursuant to Local Rule 11(i), filed February 28, 1984; Defendants' Cross-Motion for Summary Judgment and Statement of Facts pursuant to Local Rule 11(i), filed February 9, 1984; Plaintiff's Response to Defendants' Cross-Motion for Summary Judgment, filed March 5, 1984; Defendants' Supplemental Brief in Support of Motion for Summary Judgment, filed March 27, 1984; Plaintiff's Supplemental Memorandum in Support of Motion for Summary Judgment, filed May 15, 1984; Defendants' Response to Plaintiff's Supplemental Memorandum, filed May 29, 1984; Brief of the Conference of National Park Concessioners as Amicus Curiae, filed July 2, 1984; Defendants' Response to Amicus Curiae Brief, filed July 6, 1984; and the administrative record filed December 5, 1983; and having heard oral argument on the cross-motions for summary

judgment on March 19, 1984, this Court finds as follows:

Summarizing the basic facts, the National Park Service (NPS) entered into Concession Contracts with Babbitt Brothers Trading Company (Babbitt) in 1968 and with Amfac Hotels and Resorts, Inc. d-b-a Fred Harvey (Harvey) in 1969, under which contracts the concessioners would provide accommodations, facilities, and services in Grand Canyon National Park. Both Concession Contracts contained a preferential right to provide new or additional services as defined in 16 U.S.C. §20c and 36 C.F.R. §51.3(c).

In 1975, the Secretary of the Interior through the Director of NPS granted Concession Permit No. CX821-080004 to Plaintiff, under which Plaintiff was authorized to provide a hiking guide service and to rent and sell certain specified hiking, backpacking and camping equipment. Under the terms of the permit, the concessioner could offer for sale only those backpacking items for which it had secured the written approval of the park Superintendent. Over the years, the Superintendent approved several of Plaintiff's requests to expand its line of merchandise for sale.

Plaintiff's permit (attached as Exhibit 1 to Plaintiff's Complaint filed September 23, 1983) by its terms expired December 31, 1978; the permit was then extended at various intervals through March 1, 1983. An interim permit was then issued to cover the period March 2 through September 30, 1983; under the terms of the interim permit, Plaintiff was not authorized to sell its merchandise. Exhibit 10, Administrative Record filed December 5, 1983.

In February 1982, Park Superintendent Marks published a notice of intention to issue a concession permit to Plaintiff for the term of October 1, 1981 through September 30, 1985. In that notice, the Superintendent recognized that Plaintiff was an existing satisfactory concessioner and was entitled to a right of preference. Such "right of preference" is described in 16 U.S.C. §20d and 36 C.F.R. §51.3(b). A Statement of Requirements (SOR) for this proposed permit was published, to which Plaintiff submitted a responsive proposal on March 1, 1982. No other proposals were received by NPS. In a letter dated April 30, 1982, Superintendent Marks withdrew the previously-published SOR, citing "material and significant differences between the SOR and the proposal received." Exhibit 12, Administrative Record.

Following this cancellation of the proposed four-year permit, Plaintiff contacted Superintendent Marks, Russell Dickenson (Director, NPS), and David E. Gackenbach (Chief, Concessions Management, NPS) regarding numerous grievances (Exhibits 8 and 14, Administrative Record), prompting the formation of a Task Force by NPS Regional Director Chapman to investigate Plaintiff's grievances. That Task Force issued its Final Report on August 20, 1982 (Exhibit 12, Administrative Record). Following (1) the filing of a Complaint Against NPS Procedures filed by Plaintiff in October of 1982, (2) extensive briefing by Plaintiff, Babbitt, and Harvey, and (3) a memorandum opinion in July of 1983 by the Department of the Interior Field Solicitor, Regional Director Chapman decided in a July 12, 1983 letter that "all items of 'sporting goods' and 'merchandise'

held for sale to the public by [Plaintiff] shall cease, be removed from public view, and removed from the park as soon as possible." Exhibit 5 attached to Plaintiff's Complaint filed September 23, 1983. Underlying this decision was Chapman's conclusion that, based upon

> . . . all of the pertinent material, including the extensive correspondence, the Task Force Report, legal briefs and responses, legal opinions and reviews, . . . Babbitt has not waived its preferential right to the sale of 'Sporting Goods' and that its rights must be protected by the National Park Service pursuant to law and contractual agreement . . . The sale of items of 'Sporting Goods' or 'Merchandise' as they relate to the contractual preferential rights of other Grand Canyon National Park concessioners shall not be permitted in a subsequent 'Guided Hikng' concession authorization absent a written agreement between the appropriate parties and approval by the National Park Service.

Id.

Plaintiff appealed this decision to NPS Director Dickenson, who on August 8, 1983 modified Regional Director Chapman's order to the extent that Plaintiff was allowed to sell "existing on hand inventory, until September 30, 1983, under the temporary permit that is now in existence." Exhibit 6 attached to Plaintiff's Complaint filed September 23, 1983.

On August 23, 1983, NPS issued a new SOR for a hiking guide service permit, but deleted any form of sales; all proposals were due September 23, 1983. On September 27, 1983, Plaintiff filed this action and a motion for temporary restraining order enjoining De-

fendants from, *inter alia,* terminating Plaintiff's right to operate as it existed on September 28, 1983, including the right to sell sporting goods and merchandise. The temporary restraining order was granted on November 8, 1983, and the parties have stipulated to its extension during the pendency of this action.

For the purposes of Plaintiff's Motion for Summary Judgment, Defendants have agreed to Plaintiff's Statement of Facts filed January 31, 1984, *see* Defendants' Response to Plaintiff's Motion for Summary Judgment, filed February 28, 1984, at page 1. Plaintiff does not dispute any of defendants' February 9 Statements of Fact in Plaintiff's Response filed March 5, 1984. Thus, there is no genuine issue of material fact which would preclude decision by summary judgment.

Plaintiff's Motion for Summary Judgment seeks favorable decision on three basic issues:

I. That Babbitt waived its contractual preferential right to provide new or additional services and facilities, which is described in 16 U.S.C. 20c and 36 C.F.R. §51.3(c);

II. That 16 U.S.C. §20d and 36 C.F.R. §51.3(b) require the National Park Service to renew Plaintiff's permit on terms and conditions which are substantially similar to those contained in Plaintiff's previous permit which expired March 1, 1983; and

III. That the NPS' refusal to renew Plaintiff's permit on terms and conditions which are substantially similar to those contained in Plaintiff's

previous permit is arbitrary and capricious, and that Defendants should be estopped from refusing to renew such permit.

I.

For a variety of reasons, no decision is necessary or desirable on the issue whether Babbitt waived its contractual preferential right to sell certain types of sporting goods. First, Babbitt is not a party to this lawsuit and has not been afforded the opportunity to state its position on the issue in this Court. Second, whether Babbitt waived its right is irrelevant to this action; an alleged waiver of a provision in a non-party's contract has nothing to do with the rights and obligations of Plaintiff and Defendants which arose under Concession Permit No. CX821080004, which rights and obligations are expressly subject to "the laws of Congress governing the area and the rules and regulations promulgated thereunder . . ." (Concession Permit No. CX821080004, Exhibit 1 attached to Plaintiff's Complaint filed September 23, 1983, ¶13(a)). Although the perceived rights and duties of non-parties Babbitt and Harvey were the subject of extensive briefing on the administrative level, and although those perceived rights and duties form the basis of the agency's decision not to renew Plaintiff's permit on terms substantially similar to those of the previous permit, this action is properly confined to the rights and duties of the parties only.

II.

Plaintiff contends that 16 U.S.C. §20d and 36 C.F.R. §51.3(b) entitle it to a renewal of its permit on

terms and conditions substantially similar to those contained in its previous permit, because it has performed as and has been recognized as a satisfactory concessioner. Plaintiff relies heavily on the following language from 36 C.F.R. §51.3(b):

> (b) "Right of Preference" refers to the right of existing satisfactory concessioners to a preference in the renewal or negotiation of a new contract or permit covering *substantially the same accommodations, facilities and services as provided by the concessioner under the terms of its existing contract or permit . . .*

(emphasis added). Defendants respond that this language entitles Plaintiff, as a satisfactory concessioner, to a right of preference *if* the NPS determines that a new contract/permit or renewal thereof covering substantially the same services as that provided by the existing satisfactory concessioner should issue. That right of preference, argue Defendants, entitles the existing satisfactory concessioner to meet the best offer of an applicant for the permit who has no right of preference.

Based upon a review of the supplementary briefs on this issue requested by this Court, and of the *amicus curiae* brief submitted by the Conference of National Park Concessioners, it is apparent that this is an issue of first impression.

The language of 36 C.F.R. §51.3(b) cannot be read in a vacuum. It must be read in the context of and in conjunction with 16 U.S.C. §20 *et seq.* and with 36 C.F.R. §51. Upon a reading of those provisions, it appears clear that Defendants' interpretation is more consistent with the overall broad discretion granted to the

Secretary in 16 U.S.C. §20 *et seq.* and further defined in 36 C.F.R. §51.

Congress has articulated precise goals with respect to the management of national parks, 16 U.S.C. §20, and has directed the Secretary to limit the development of accommodations, facilities and services to "those that are necessary and appropriate for public use and enjoyment of the national park area . . . and that are consistent to the highest practicable degree with the preservation and conservation of the areas." *Id.* To that end, Congress has vested in the Secretary the discretion to determine whether the operation of such accommodations, facilities and services should rest in the hands of one concessioner or several, 16 U.S.C. §20c, and whether to enter into a contractual or permit arrangement with the concessioner, 16 U.S.C. §20d; *see also* 36 C.F.R. §51.3(a).

It is true that Congress directed the Secretary, and thus his delegate Director of NPS, to "encourage continuity of operation and facilities and services by giving preference in the renewal of contracts or permits and in the negotiation of new contracts or permits to the concessioners who have performed their obligations under prior contracts or permits to the satisfaction of the Secretary." 16 U.S.C. §20d; *see also* 36 C.F.R. §51.3(b). But this "right of preference" does not appear to be an enforceable right or entitlement to be offered a contract/permit renewal or a new contract/permit; such an interpretation would force the Secretary to award contracts, permits, and renewals thereof to satisfactory concessioners for unnecessary or undesirable services, which

is inconsistent with the otherwise broad discretion vested in the Secretary to determine what services will best implement the Congressional intent articulated in 16 U.S.C. §20.

It is clear to this Court that the Secretary and/or his delegate is not obliged to renew contracts or permits, 16 U.S.C. §20d (" . . . the Secretary, at any time in his discretion, may extend or renew a contract or permit . . ."). Thus, Plaintiff is not entitled to a renewal of its permit. *If*, however, the Secretary chooses to issue a new contract, permit, or renewal thereof, which contract, permit, or renewal thereof covers "substantially the same accommodations, facilities and services," 36 C.F.R. §51.3(b), as that provided under the contract or permit of an existing satisfactory concessioner, then the Secretary must recognize and honor the right of preference in the existing satisfactory concessioner and give that concessioner "an opportunity to meet the terms and conditions of the best proposal," 36 C.F.R. §51.5(b), made by a party with no right of preference. This appears to be the proper interpretation of the 36 C.F.R. §51.3(b) language, when read in conjunction with its counterpart statutory language and accompanying regulations.

In this case, NPS did decide to issue a four-year permit. It recognized the right of preference enjoyed by Plaintiff in its February 1, 1982 Notice of Intention to Issue Concession Permit. It received Plaintiff's proposal and cited several "material and significant differences" between what it required and what Plaintiff proposed. It cancelled the Notice of Intention and Statement of Requirements in a letter to Plaintiff dated April 30, 1982.

This cancellation is authorized by 36 C.F.R. §51.4(c), which reads in pertinent part: "The Director may choose to reject all proposals received at any time and resolicit or cancel the solicitation altogether in his discretion when in the best interest of the Government." [1]

III.

Plaintiff further argues that the NPS' refusal to renew its permit on terms and conditions substantially similar to those contained in its previous permit is arbitrary and capricious, and that it should be estopped from refusing to honor Plaintiff's right of preference.

As described above, it is the opinion of this Court that Plaintiff has no right to a renewal of its permit on terms and conditions substantially similar to those contained in its previous permit. Further, NPS *did* recognize Plaintiff's right of preference when it solicited proposals on February 1, 1982; the "right of preference" urged by Plaintiff here simply does not exist under this Court's interpretation of 36 C.F.R. §51.3(b).

The NPS did refuse to renew Plaintiff's permit *in toto, however*. That action may be reviewed by this Court under the test outlined in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-17, 91 S.Ct. 814, 823-24 (1971), guided by the rule that "the Secre-

[1] Section 51.4 applies to the solicitation and award of concession contracts and permits where no right of preference exists. Here, of course, NPS recognized Plaintiff's right of preference. However, §51.5, which applies to the solicitation and award of concession contracts and permits where a right of preference does exist, states that the §51.4 procedures apply, with a few specified exceptions. Section 51.5 does not delete the Director's authority to withdraw or cancel solicitations as described in §51.4.

tary's decision is entitled to a presumption of regularity." *Id.*, 401 U.S. at 415, 91 S.Ct. at 823.

"The court is first required to decide whether the Secretary acted within the scope of his authority." *Id.* As noted above, Congress specified in 16 U.S.C. §20d that ". . . the Secretary, at any time in his discretion, may extend or renew a contract or permit . . ." Nothing in that provision requires the Secretary to renew a permit; thus, refusal to renew is within the scope of the Secretary's authority. Further, Plaintiff's permit was expressly subject to revocation or amendment at any time at the discretion of the Superintendent.

Next, the reviewing court must find that "the actual choice made was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Overton Park, supra,* 401 U.S. at 416, 91 S.Ct. at 823, citing 5 U.S.C. §706(2)(A) (1964 ed., Supp. V). The decision not to renew Plaintiff's permit appears to have rested on the "material and significant differences" between NPS' Statement of Requirements and Plaintiff's proposal, as outlined in Superintendent Marks' letter of April 30, 1982. Further, Plaintiff's numerous grievances following this decision were fully aired administratively, resulting in a final decision by NPS Director Dickenson which was based on his review of the legal briefs submitted by Plaintiff, Babbitt, and Harvey; the Regional Director's decision; the Field Solicitor's memoranda, and reports associated with this entire dispute." Exhibit 6 attached to Plaintiff's Complaint filed September 23, 1983. Thus, it cannot be said that the decision was made arbitrarily; and with respect to the decision actually

made, it is not this Court's function to "substitute its judgment for that of the agency." *Overton Park, supra,* 401 U.S. at 416, 91 S.Ct. at 824.

"The final inquiry is whether the Secretary's action followed the necessary procedural requirements." *Id.*, 401 U.S. at 417, 91 S.Ct. at 824. Here, NPS complied with 36 C.F.R. §51.5, recognizing Plaintiff's 36 C.F.R. §51.3(b) right of preference as a satisfactory concessioner. NPS cancelled the solicitation, which is permitted by 36 C.F.R. §51.4(c). Plaintiff's argument that Defendants have failed to follow 36 C.F.R. §51.3(b) is based on a misinterpretation of that regulation; Plaintiff does not otherwise allege that Defendants have failed to comply with necessary procedural requirements.

Based upon the foregoing,

IT IS ORDERED that Plaintiff's Motion for Summary Judgment, filed January 31, 1984, is denied.

IT IS FURTHER ORDERED that Defendants' Cross-Motion for Summary Judgment, filed February 9, 1984, is granted.

IT IS FINALLY ORDERED that the Temporary Restraining Order granted November 8, 1983 is hereby vacated.

DATED this 22nd day of August, 1984.

C. A. Muecke, Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CANYONEERS, INC., etc., dba
GRAND CANYON TRAIL GUIDES,
Plaintiff/Appellant,

v.

Donald Hodel,* Secretary,
Department of the Interior, et al.,
Defendants/Appellees

No. 84-2562
DC No. CV 83-1881-CAM
OPINION

Appeal from the United States District Court
for the District of Arizona
Carl A. Muecke, District Judge, Presiding

Argued and Submitted February 12, 1985
Before: PREGERSON and FERGUSON, Circuit Judges,
and STEPHENS,** District Judge

FERGUSON, Circuit Judge:

Canyoneers, Inc., an Arizona corporation operating in the Grand Canyon National Park, appeals from an adverse ruling by the district court regarding the failure of the National Park Service ("NPS") to renew Canyoneers' concession permit. The district court held that the statutory preference right afforded Canyoneers as a satisfactory concessioner does not vest Canyoneers with an entitlement to permit renewal on substantially the

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* Donald Hodel has been substituted for William P. Clark pursuant to Fed. R. App. P. 43(c)(1).

** Honorable Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

same terms. Instead, the district court held that the relevant portion of the Concessions Policy Act of 1965, 16 U.S.C. § 20d, only entitles satisfactory concessioners the opportunity to meet the terms and conditions of any competing concessioner proposals.

The plaintiff corporation filed this suit in 1983 in district court against the defendant Secretary alleging that it had been wrongfully denied its statutory preference rights when the National Park Service failed to renew its concession permit in 1983 so as to allow the sale of hiking gear. Essentially, the plaintiff company contended that it was arbitrarily denied a permit continuing its prior authorization to sell backpacking and camping gear to tourists at Grand Canyon National Park in derogation of the preference rights articulated in a statute, 16 U.S.C. § 20d, and an implementing regulation, 36 C.F.R. § 51.3(b). On cross-motions for summary judgment the district court entered summary judgment for the defendant Secretary. The district court held that the statutory right of preference for renewal of a concession permit is not an enforceable entitlement to the renewal or award of a concession permit. The plaintiff appeals.

Stated simply, the district court construed 16 U.S.C. § 20d as guaranteeing only a procedural preference to existing concessioners—that is, satisfactory concessioners must be given the right to match competing bids to the renewal or award of future permits. Conversely, the plaintiff, joined by amicus Mountain States Legal Foundation, contends that the statutory preference right entitles an existing concessioner to renewal of their permit on identical terms as long as the concessioner has satisfac-

torily met the conditions of the current permit and a need remains for these concession services. We agree with the district court's interpretation and, reviewing the administrative record, find that the Secretary's actions were not arbitrary or capricious.

FACTUAL BACKGROUND

Canyoneers, Inc., began its Grand Canyon operations in 1975 under a NPS permit which authorized plaintiff to provide "hiking guide services." The 1975 permit also required plaintiff to maintain adequate supplies of rental hiking equipment and authorized the sale of types and lines of hiking gear upon the issuance of written approval by the Superintendent of the Grand Canyon National Park ("Superintendent").

For the first three years of its operation under the permit Canyoneers only provided guide and equipment rental services. In the spring of 1978 the Superintendent, Merle Stitt, gave written authorization for Canyoneers to sell specific items of hiking equipment. Canyoneers original concession permit was thereafter extended from October 1980 through September 1981 in a letter from the new Superintendent, Richard Marks.

In February 1982, the NPS published a "Notice of Intent to Issue a Concession Permit" in which it proposed issuing a four-year permit to Canyoneers that included the right to sell hiking gear. The published notice states that Canyoneers had been a satisfactory concessioner and therefore was "entitled to be given preference in the renewal of the concession permit and in the negotiation of a new concession permit." The published notice also

solicited other proposals which, if submitted, the NPS would be statutorily bound to consider.

The NPS thereafter issued a Statement of Requirements ("SOR") detailing the minimal services that the successful permit proposal would have to meet. Canyoneers submitted the only proposal. In their response to the SOR, Canyoneers "agreed" to the SOR but noted that they disagreed with several of the SOR terms. Canyoneers' written response indicated that "[f]urther discussion is essential," and complained that the SOR would deprive them of prior permit rights. The Canyoneers' disagreement with the SOR encompassed such basic issues as the amount of the franchise fee and the geographic limitations placed on the plaintiff's Canyon activities.

At this point, a competing concessioner located in the Canyon, Babbitt, sent a letter to Superintendent Marks complaining of the increasing volume of camping gear sales by the plaintiff. Babbitt had been operating in the Canyon as the sole sales business of hiking gear since 1968 when it had been issued a twenty-year contract. Babbitt's concession contract included the right to sell "sporting goods." Although Babbitt's performance as a concessioner was criticized in the mid-1970's by then Superintendent Stitt, Babbitt's contract was never formally revoked in part or in full. The only other concessioner in the Canyon, Amfac Hotels ("Harvey"), is not authorized to sell sporting goods. Nonetheless, after Babbitt complained of encroachment by Canyoneers to Superintendent Marks, Harvey followed with a similar letter complaint regarding sales of other merchandise.

Superintendent Marks responded to the Babbitt complaint and indicated that a further investigation was warranted. The day after Superintendent Marks acknowledged Babbitt's letter he answered the Canyoneers' SOR response in a letter which noted the material discrepancies between the SOR terms and the Canyoneers' response. This April 30, 1982 letter also gave notice that the NPS was cancelling the SOR and rejecting the Canyoneers proposal because of the material differences between it and the SOR.

After this exchange of communication, Canyoneers filed several administrative grievances, triggering the formation of a Task Force by the NPS Regional Director. During the pendency of the administrative proceedings the Superintendent extended the Canyoneers' existing permit through December 1982, at which time "the permit will be allowed to expire by its own terms, and will only be renewed through successful response to a [SOR] for a new concession permit."

The Regional Director's Final Report of the Task Force was issued on August 20, 1982 and determined that Babbitt had not waived its original preferential right to the sale of sporting goods. Accordingly, NPS was obligated to honor Babbitt's right of preference. Regional Director Chapman ordered Canyoneers to cease selling sporting goods. Canyoneers appealed this decision to the Director of NPS. In August 1983 the Director of NPS affirmed the Regional Director's decision but modified the order to permit Canyoneers to sell its remaining inventory until September 30, 1983.

After the Director's final decision, NPS issued a new SOR limited to a hiking guide service without the right to sell merchandise. Canyoneers thereafter filed this suit claiming entitlement to renewal of its prior permit for substantially the same services. The district court initially entered a temporary restraining order in favor of Canyoneers, which was extended by agreement of the parties until the completion of the district court proceedings. On cross-motions for summary judgment, the district court granted judgment for the defendant and declined to stay the judgment pending appeal. This court entered a stay of the district court judgment pending appeal.

STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. *Lojek v. Thomas,* 716 F.2d 675, 677 (9th Cir. 1983). The decision of the NPS Director is subject to review under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), requiring this court to determine whether the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Walker v. Navajo-Hopi Indian Relocation Comm'n,* 728 F.2d 1276, 1278 (9th Cir.), *cert. denied,* 105 S.Ct. 298 (1984). The defendant has defended his action on the basis of his interpretation of his authority to grant or renew concession permits. Thus, this court must initially determine whether his decision was based on a reasoned, permissible construction of the relevant statute and regulation. *Chevron USA, Inc. v. National Resources Defense Council, Inc.,* 104 S. Ct. 2778, 2782 (1984); *Villa View Community Hospital, Inc. v. Heckler,* 720 F.2d 1086, 1090 (9th Cir. 1983).

of the statutory preference right is more consistent with congressional intent regarding the scope of the Secretary's discretion. As the district court stated:

> Plaintiff is not entitled to a renewal of its permit. *If*, however, the Secretary chooses to issue a new contract, permit, or renewal thereof, which contract, permit, or renewal thereof covers "substantially the same accomodations, facilities and services," 36 C.F.R. § 51.3(b), as that provided under the contract or permit of an existing satisfactory concessioner, then the Secretary must recognize and honor the right of preference in the existing concessioner and give that concessioner "an opportunity to meet the terms and conditions of the best proposal," 36 C.F.R. § 51.5(b), made by a party with no right of preference.

Order of August 22, 1984, at 8 (emphasis in original).

Construed in this manner, the statutory preference right would afford satisfactory concessioners the opportunity to match competing proposals. At the same time, this interpretation would permit the Secretary to take into account the changing needs of our nation's parkland without becoming restricted to the choice of proceeding under the same set of services provided by the same concessioner or not offering these services at all. Moreover, the statutory admonition that the Secretary "shall consider and evaluate al proposals received," 20 U.S.C. § 20d, would be rendered meaningless if existing concessioners were entitled to automatic renewal of their permits based solely on their status as satisfactory concessioners. As the legislative history reveals, *see* S. Rep. No. 765, 89th Cong., 1st Sess. 19 (1965), Congress did not view the right of preference as an "absolute" entitlement

to renewal. Instead, Congress intended that the Secretary take "all relevant factors" into account in negotiating for concession permits. *Id.*

In sum, finding the district court's statutory construction of the preference right persuasive, we hold that the statutory "preference in the renewal of contracts or permits" does not entitle satisfactory concessioners to an automatic right of renewal but rather a right to meet the terms of any competing proposal submitted to the Secretary for the provision of substantially similar services. This is not to say, however, that the Secretary can exercise his considerable discretion under the Act in an arbitrary or capricious manner.

THE SECRETARY'S DETERMINATION

A review of the administrative record demonstrates that the determination of the Secretary regarding plaintiff's sale permit was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. The defendant Secretary recognized the plaintiff's preference rights in the issuance of the SOR. Plaintiff's response was deemed inconsistent with the terms of the SOR and therefore unacceptable to the Secretary. Pursuant to 36 C.F.R. § 51.4(c), the Secretary then cancelled the SOR. As the plaintiff's preference rights under 20 U.S.C. § 20d did not entitle plaintiff to renewal on substantially the same terms, the defendant did not violate any statutory right of plaintiff by failing to extend Canyoneers' prior permit or by rejecting Canyoneers submission as unresponsive to the SOR.

Plainly, the defendant was acting within the scope of his statutory authority. The Task Force Report chronicles the detailed manner in which the defendant addressed "the relevant factors," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Nor can it be said that the administrative record reveals that "there has been a clear error of judgment." *Id.* Finally, the defendants' recognition of the plaintiff's preference right met the procedural requirements imposed on the Secretary by virtue of 16 U.S.C. § 20d.

We have reviewed the plaintiff's other contentions on appeal and conclude that they are also without merit. Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX 4

CONCESSIONS FOR ACCOMMODATIONS, FACILITIES, AND SERVICES IN AREAS ADMINISTERED BY NATIONAL PARK SERVICE

§ 20. Policy of Congress

In furtherance of the Act of August 25, 1916 (39 Stat. 535), as amended (16 U.S.C. 1) [16 USCS §§ 1, 2-4], which directs the Secretary of the Interior to administer national park system areas in accordance with the fundamental purpose of conserving their scenery, wildlife, natural and historic objects, and providing for their enjoyment in a manner that will leave them unimpaired for the enjoyment of future generations, the Congress hereby finds that the preservation of park values requires that such public accommodations, facilities, and services as have to be provided within those areas should be provided only under carefully controlled safeguards against unregulated and indiscriminate use, so that the heavy visitation will not unduly impair these values and so that development of such facilities can best be limited to locations where the least damage to park values will be caused. It is the policy of the Congress that such development shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located and that are consistent to the highest practicable degree with the preservation and conservation of the areas.

§20a. Private operation of concessioners encouraged

Subject to the findings and policy stated in section 1 of this Act [16 USCS § 20], the Secretary of the Interior shall take such action as may be appropriate to encour-

age and enable private persons and corporations (hereinafter referred to as "concessioners") to provide and operate facilities and services which he deems desirable for the accommodation of visitors in areas administered by the National Park Service.

§20b contracts; rates and changes, franchise fees
(b) Profit commensurate with capital invested and obligations assumed. The Secretary shall exercise his authority in a manner consistent with a reasonable opportunity for the concessioner to realize a profit on his operation as a whole commensurate with the capital invested and the obligations assumed.

§20d. Extension and renewal of contracts
The Secretary shall encourage continuity of operation and facilities and services by giving preference in the renewal of contracts or permits and in the negotiation of new contracts or permits to the concessioners who have performed their obligations under prior contracts or permits to the satisfaction of the Secretary. To this end, the Secretary, at any time in his discretion, may extend or renew a contract or permit, or may grant a new contract or permit to the same concessioner upon the termination or surrender before expiration of a prior contract or permit. Before doing so, however, and before granting extensions, renewals or new contracts pursuant to the last sentence of section 4 of this Act [16 USCS § 20c], the Secretary shall give reasonable public notice of his intention so to do and shall consider and evaluate all proposals received as a result thereof.

36 C.F.R., Part 51.

§51.3 Definitions.

The following definitions shall apply to this Part 51:

(b) "Right of Preference" refers to the right of existing satisfactory concessioners to a preference in the renewal or negotiation of a new contract or permit covering substantially the same accommodations, facilities and services as provided by the concessioner under the terms of its existing contract or permit. Prior to the expiration or termination of a contract or permit a determination shall be made based on annual evaluations, as to whether or not the concessioner is entitled to a preference in the renewal of its contract or permit. An unsatisfactory rating, results in the loss of the right of preference.

§51.5 Solicitation and award of concession contracts and permits or extensions or renewal of concession contracts and permits, where a right of preference exists.

The procedures described in §51.4 shall apply to the solicitation, negotiation and award of extensions, renewals, or replacement of contracts or permits by a new contract or permit where an existing concessioner has a right of preference except as follows:

(b) The concessioner with the right of preference shall be required to submit a proposal in response to the fact sheet. If, after evaluation of all proposals received, a proposal other than that of the existing concessioner is determined to be the best proposal, the existing concessioner shall be given an opportunity to meet the terms and conditions of the best proposal. If the existing con-

cessioner does so and its proposal, as amended, is in the judgment of the Director, at least substantially equal to the best proposal, the existing concessioner shall be selected for negotiation of the contract or permit. If not, the contract or permit will be negotiated with the party that submitted the best proposal.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CURRENT-JACKS FORK CANOE RENTAL ASSOCIATION,

Plaintiff,

vs.

WILLIAM CLARK,
Secretary of the Interior, et al.,

Defendants.

No. S84-18C(1)

[Non-relevant portions omitted]

B. CONCLUSIONS OF LAW

This Court has jurisdiction of this case pursuant to 28 U.S.C. §§1331, 1343. Plaintiff asserts that defendants violated its fifth amendment due process rights by departing from the specifications set forth in 16 U.S.C. §§3, 20c, 20d and 36 CFR §§51.1-51.7.

This is an action by Canoe Rental Association against the Interior Department defendants and the Previously Unpermited Operators for declaratory and injunctive relief. Plaintiff alleges that defendants usurped their constitutional and statutory rights by denying its members a right of preference with the negotiation of new concession contracts and permits. Plaintiff seeks a preliminary injunction enjoining defendants from implementing and operating under the newly issued concession permits, and a directive for defendants to negotiate a new set of permits and contracts which afford plaintiff such preference rights.

The statutes to which plaintiff refers in arguing that its members are entitled to a right of preference are 16 U.S.C. §§20c and 20d. The former section relates to the addition of new or expanded services within a national park to those services previously provided by a single concessioner. Section 20d, concerns new and renewal contracts and permits for existing services. This section provides:

> The Secretary shall encourage continuity of operation and facilities and services by giving preference in the renewal of contracts or permits and in the negotiation of new contracts or permits with the concessioners who have performed their obligations under prior contracts or permits to the satisfaction of the Secretary. To this end, the Secretary, at any time in his discretion, may extend or renew a contract or permit, or may grant a new contract or permit to the same concessioner upon the termination or surrender pefore expiration of a prior contract or permit. Before doing so, however granting extensions, renewals or new contracts pursuant to the last sentence of §20c of this title, the Secretary shall give reasonable public notice of his intention so to do and shall consider and evaluate all proposals received as a result thereof.

36 CFR §51.3(b) supplies insight into the meaning and application of the right of preference. This section provides:

> "Right Of Preference" refers to the right of existing satisfactory concessioners to a preference in the renewal or negotiation of a new contract or permit covering substantially the same accommodations, facilities and services as provided by the

> concessioner under the terms of its existing contract or permit. Prior to the expiration or termination of a contract or permit a determination shall be made based on annual evaluations, as to whether or not the concessioner is entitled to a preference in the renewal of its contract or permit. An unsatisfactory rating, results in the loss of the right of preference.

In addition, 36 CFR §51.1 *et seq.* describes the appropriate application and mechanics of the right of preference. Section 51.5 calls upon the government to issue a fact sheet rather than a Prospectus to the concessioner possessing the right of preference. Competitors may submit bids, yet holders of the preference rights must be given opportunities to meet the final proposals of the competitors.

Plaintiff submits that its members were denied their due right of preference in the negotiation of the 1984 contracts and permits. The Interior Department defendants concede this much, via the testimony of defendant Sullivan. Also, plaintiff provides several exhibits in the form of correspondence from the Interior Department defendants, in which these defendants set forth their intentions not to extend a right of preference to plaintiff members. In view of this factor, the question for this Court's resolution is whether plaintiff is entitled to an injunction . . . .

In the opinion of this Court, application of these factors to the facts of this case warrants issuance of a permanent injunction.

1. *Success On The Merits*

This Court concludes that plaintiff has successfully demonstrated its entitlement to relief on the merits. In reading the applicable statute, 16 U.S.C. §20d, this Court is convinced that granting a right of preference to existing concessioners is mandatory, not discretionary.

Section 20d is the statute which describes the application of the right of preference to new and renewal contracts. The first sentence is couched in mandatory language, and requires the Secretary of the Interior to give preference in the issuance of the new and renewal of contracts or permits to those concessioners who previously performed their obligations in a satisfactory manner. The next sentence is framed in discretionary terms. "To this end, the Secretary, at any time in his discretion, may extend or renew a contract or permit, or may grant a new contract or permit to the same concessioner upon the termination or surrender before expiration of a prior contract or permit." This particular sentence concerns renewing or extending contracts, while any mention of preference rights is lacking. Furthermore, the sentence begins with "to this end." This language indicates that the sentence provides an additional suggestion as to how the Secretary may perform his statutory duty of encouraging continuity of operation and facilities. Thus, the giving of preference in new or renewal contracts or permits is mandatory, while the decision to renew a contract or permit is discretionary.

This interpretation of the statute is borne out by the legislative history, as well.

> Section 20d directs the Secretary to give preference to satisfactorily established operators in a national park system area when the time comes for the renewal or extension of contracts, or for the negotiation of new contracts. It authorizes him to extend or renew old contracts and to grant a new contract before the expiration of the old one if the need therefor arises.

S. Rep. No. 765, 89th Cong., 1st Sess. 6th (1965), *reprinted in* (1965) U.S. Code Cong. & Ad. News 3489, 3494. The history suggests that the right of preference in §20d is mandatory, and the remainder of the section relates to the decision of the Secretary to extend or renew contracts or permits.

The Interior Department defendants do not take issue with this particular interpretation, but rather stand upon some statements contained in *Free Enterprise Canoe Renters Assoc. of Missouri v. Watt,* 711 F.2d 852 (8th Cir. 1983). *Free Enterprise* concerned the right of certain canoe operators to provide services in the ONSR without permits. The court held that the NPS could validly regulate canoe traffic on the ONSR by issuing permits. As a final note, however, the court stated:

> Nonetheless, we expect no discrimination in the future when permits come up for renewal. At oral argument, counsel for the government represented that when the current permits expire, non-concessioned operators will be able to compete with the concessioners for permit renewals on equal footing and on the basis of objective and published criteria. We accept this representation.

Id. at 858. In addition, the court explicitly stated in the

footnote, "we recognize that 16 U.S.C. §20d (1976) authorizes a renewal preference for existing concessioners. However, the statute does not require the Secretary to honor the preference. It provides that 'the Secretary, at any time in his discretion, *may* extend or renew a contract or prmit.' (emphasis added)." *Id.* at 858 n. 8.

The Court denied a request by the government for clarification on these particular statements in the opinion. In so ruling, the Court interpreted a statement by the government that the unpermitted operators would receive a fair opportunity to compete with the permitted operators, as mandating equal treatment of both permitted and unpermitted operators in future negotiations. *Id.* at 858. Defendant Sullivan testified that these statements in the *Free Enterprise* opinion motivated the Interior Department defendants to deny Canoe Rental Association members their right of preference.

This Court concludes that the *Free Enterprise* language relied upon by the Interior Department defendants is dicta. The permitted operators were not before the court, and the interpretation given to the statute by the court was unnecessary for resolution of the case.

Fort Sumter Tours, Inc. v. Andrus, 564 F.2d 1119 (4th Cir. 1977), additionally supports the plaintiff's position. In *Fort Sumter,* a concessioner sued to prevent the Department of Interior from issuing a contract to another. The parties did not dispute the existence of the plaintiff's right of preference to negotiate the renewal of the prior agreement. The controversy rather centered

around the content of that preference. The court in fact stated, "[i]n essence, §20d grants preferential renewal rights to those existing concessioners who have performed their obligations under prior contracts in a manner satisfactory to the Secretary." *Id.* at 1121.

The only other decision relating to a §20d right of preference is *Canyoneers, Inc. v. Clark,* 596 F. Supp. 106 (D. Ariz. 1984). In *Canyoneers,* the court ruled that the concessioner had a right of preference to bid on a new concession, but that the NPS was not obligated to continue a service which it had resolved to eliminate. The Interior Department defendants argue that in creating the district system herein, the government altered the contract or permit specifications to which plaintiff members must comply. These defendants contend that under *Canyoneers,* the new terms are not arbitrary or capricious, or beyond their authority to impose.

Although the government clearly has a right to alter specifications or to change the conditions under which new contracts or permits are issued, the Interior Department defendants may not deny Canoe Rental Association members their statutorily mandated right of preference. The regulations provide that a right of preference shall apply to new contracts or permits "covering substantially the same accomodations, facilities and services as provided by the concessioner under the terms of its existing contract or permit." 36 C.F.R. §51.3(b). This Court determines that the new contracts and permits are substantially similar as to require a right of preference. *Canyoneers* is also distinguishable because it involved can-

cellation of a contract or permit for substantially the same services. Furthermore, this Court concludes that the issue raised by plaintiff is not the right of the government to establish districts. This matter remains undisputed. Rather ,the issue centers around the failure of the Interior Department defendants to extend a right of preference to Canoe Rental Association members when the Previously Unpermitted Operators received licenses by the Government to provide services in the ONSR.

This Court concludes that plaintiff has established its burden of showing its entitlement to relief on the merits. The Court reads 16 U.S.C. §20d as creating a mandatory right of preference for satisfactory performance when concession contracts or permits are renewed or extended. The members of plaintiff performed the obligations of their prior contracts and permits in a satisfactory manner. The Interior Department defendants admit they did not afford Canoe Rental Association members the mandated preference because of their reliance upon the *Free Enterprise* decision. Such reliance was misplaced, however . . . .

4. *Effect On The Public Interest*

The final factor is whether the public interest supports the issuance of an injunction. Here, there is a strong public interest in ensuring the implementation of the Congressionally proclaimed policy of providing for a continuity in services to the public and in ensuring that the concessioners receive their statutorily mandated right of preference. These reasons justify injunctive relief.

C. CONCLUSION

For the foregoing reasons, an injunction is entered this day directing the Interior Department defendants to afford plaintiff members a right of preference under 16 U.S.C. §20d. This injunction does not preclude the Interior Department defendants from awarding contracts and permits to the Previously Unpermitted Operators. Nor does it enjoin such defendants from adopting its district system and related restrictions as a means of controlling canoe traffic in the ONSR. The injunction merely reuires the Interior Department defendants to offer Canoe Rental Association members a right of preference as described in 16 U.S.C. §20d and the accompanying regulations, in the negotiation of new and renewal contracts and permits.